89-265

Supreme Court, U.S.
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No. 89-

IN THE
Supreme Court of the United States
OCTOBER TERM 1989

EASTON PUBLISHING COMPANY

Petitioner,

v.

ALFRED R. BOETTGER

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

I. WHETHER A STATE STATUTE WHICH CREATES A CIVIL CAUSE OF ACTION FOR PUBLICATION OF TRUTHFUL INFORMATION OBTAINED FROM PUBLIC COURT FILES VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS.

II. WHETHER A STATE STATUTE VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS BY IMPOSING STRICT LIABILITY IN THE FORM OF AN IRREBUTABLE PRESUMPTION OF INVASION OF PRIVACY.

STATEMENT PURSUANT TO SUPREME COURT RULES 21.1(b) and 28.1

Pursuant to Supreme Court Rules 21.1(b) and 28.1, the following parties appeared below: Alfred R. Boettger, plaintiff; Thom Loverro, defendant; and Easton Publishing Company, defendant. Thom Loverro was dismissed as a defendant prior to trial and is not a party to this petition. Defendant Easton Publishing Company, at the time of trial, was a closely held Pennsylvania corporation.

Subsequent to trial, Easton Publishing Company was dissolved pursuant to court order. The judgment in this case is enforceable against the former shareholders of the company. Funds to satisfy the judgment are being held in escrow by counsel to the parties. In the event this Court reverses the decision below, said funds will be distributed to the former shareholders under the court approved plan of dissolution. During its existence, Easton Publishing Company had no

subsidiaries or parent companies. The former shareholders of Easton Publishing Company are the following:

Thomas P. Stitt, Trustee under agreement dated 2/7/67 for benefit of Jean Thompson; William C. Stackhouse; Donald W. Diehl; Helen C. Bradford; Marjorie M. Stackhouse; Linda Rand, Trust Officer, Lafayette Bank for Estate of George F. Coffin, Jr.; First Valley Bank and Judith F. Thomas, Co-Trustees under deed of trust of Adele S. Fretz dated December 23, 1969; Catharine McGrath; Clare Hoke; Donald S. Stackhouse; J. L. Stackhouse, Jr.; Joan E. Warker; Patricia Koch; John H. McGrath, III; Marjorie H. Diehl; Henrietta A. McPherson; Carole L. Baker; James C. Hoke; James L. Baker, Jr.; BMS & Company, Nominee c/o Central Trust Bank Trust Department; Blanche A. Snyder Trust c/o Central Trust Bank Trust Department; Blanche A. Snyder; Henry S. Fretz; Judith F. Thomas; Gary R. Morgan and Carter R. Buller, Esquires, Executors of the Estate of John L. Fretz; Richard L. Ament, III; Austin Ament Taber; Peter S. Ament.

Rule 28.4(c) STATEMENT

In this proceeding, the constitutionality of the Pennsylvania Wiretapping and Electronic Surveillance Control Act of 1978, 18 Pa. Cons. Stat. § 5725, is drawn into question. The Commonwealth of Pennsylvania is not a party to this proceeding. Because 28 U.S.C. § 2403(b) may be applicable, this Petition for Certiorari is being served upon Ernest D. Preate, Jr., Attorney General of the Commonwealth of Pennsylvania, 16th Floor, Strawberry Square, Harrisburg, PA 17120.

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OPINIONS BELOW

The following are reproduced in their entirety in the Appendix:

Appendix A — Order of the Supreme Court of Pennsylvania dated May 18, 1989, denying the Petition for Reargument (and denying the Application for Relief filed by the Pennsylvania Attorney General).

Appendix B — Judgment and Opinion of the Supreme Court of Pennsylvania dated March 8, 1989, in *Boettger* v. *Loverro, et al.*, 555 A.2d 1234 (Pa. 1989).

Appendix C — Opinion of the Superior Court of Pennsylvania dated January 3, 1986, in *Boettger* v. *Loverro, et al.*, 502 A.2d 1310 (Pa. Super. Ct. 1986).

Appendix D — Order of the Court of Common Pleas of Northhampton County, Pennsylvania en banc dated March 6, 1984.

JURISDICTIONAL STATEMENT

This case was tried before the Court of Common Pleas of Northhampton County, Pennsylvania. The trial court directed a verdict in favor of the respondent on the ground that the petitioner was strictly liable for the publication of truthful information contained in public court files pursuant to Section 5725 of the Wiretapping and Electronic Surveillance Control Act of 1978, 18 Pa. Cons. Stat. § 5701 et. seq. The trial court entered judgment on March 6, 1984. (Appendix D)

In an opinion dated January 3, 1986, the Superior Court of Northhampton County reversed the trial court and entered judgment in favor of petitioner. (Appendix C)

In an opinion dated March 8, 1989, the Supreme Court of Pennsylvania reinstated the trial court's judgment against petitioner. (Appendix B)

Petitioner filed a timely Petition for Reargument which was denied by the Supreme Court of Pennsylvania on May 18, 1989. (Appendix A)[1]

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a) as a case which draws into question the validity of Pennsylvania statute 18 Pa. Cons. Stat. § 5725 on the grounds that it is repugnant to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. 1: "Congress shall make no law . . . abridging the freedom of speech or of the press. . . . "

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[1]Following the March 8, 1989 decision of the Supreme Court of Pennsylvania in this case, the Pennsylvania Attorney General filed an "Application for Relief" which was also denied in the same Order (Appendix A) dated May 18, 1989.

U.S. CONST. AMEND. XIV, § 1: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

18 PA. CONS. STAT. § 5703: INTERCEPTION, DISCLOSURE OR USE OF WIRE OR ORAL COMMUNICATIONS

> Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he:
>
> (2) willfully discloses or endeavors to disclose to any other person the contents of any wire or oral communication or evidence derived therefrom, knowing, or having reason to know that the information was obtained through the interception of a wire or oral communication; . . .

18 PA. CONS. STAT. § 5714: RECORDING OF INTERCEPTED COMMUNICATIONS

(b) Sealing of recordings.—Immediately upon the expiration of the order or extensions or renewals thereof, all monitor's records, tapes and other recordings shall be transferred to the judge issuing the order and sealed under this direction. Custody of the tapes, or other recordings shall be maintained wherever the court directs. They shall not be destroyed except upon an order of the court and in any event shall be kept for ten years. Duplicate tapes, or other recordings may be made for disclosure or use pursuant to section 5717 (relating to disclosure or use of contents of wire or oral communications or derivative evidence). The presence of the seal provided by this section, or a satisfactory explanation for its absence, shall be a prerequisite for the disclosure of the contents of any wire or oral communication, or evidence derived therefrom, under section 5717(b).

18 PA. CONS. STAT. § 1515: SEALING OF APPLICATIONS, ORDERS, AND SUPPORTING MATERIAL

Applications made, final reports, and orders granted pursuant to this chapter and supporting papers and monitor's records shall be sealed by the court and shall be held in custody as the court shall direct and shall not be destroyed except on order of the court and in any event shall be kept for ten years. They may be disclosed only upon a showing of good cause before a court of competent jurisdiction except that any investigative or law enforcement officer may disclose such applications, orders and supporting papers to investigative or law enforcement officers of this or another state, any of its political subdivisions, or of the United States to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure. In addition to any remedies and penalties provided by this chapter, any violation of the provisions of this section may be punished as contempt of the court.

18 PA. CONS. STAT. § 5725: CIVIL ACTION FOR UNLAWFUL INTERCEPTION, DISCLOSURE OR USE OF WIRE, ELECTRONIC OR ORAL COMMUNICATION

(a) Cause of action.—Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication; and shall be entitled to recover from any such person:

(1) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation; or $1,000, whichever is higher.

(2) Punitive damages.

(3) A reasonable attorney's fee and other litigation costs reasonably incurred.

(b) Waiver of sovereign immunity.—To the extent that the Commonwealth and any of its officers, officials or employees would be shielded from liability under this section by the doctrine of sovereign immunity, such immunity is hereby waived for the purposes of this section.

(c) Defense.—It is a defense to an action brought pursuant to subsection (a) that the actor acted in good faith reliance on a court order or the provisions of this chapter.

STATEMENT OF THE CASE

This case arises from the publication of an article in the April 7, 1982 edition of *The Easton Express*, a daily newspaper of general circulation which was owned and published by Easton Publishing Company. The article, which was written by reporter Thom Loverro, discussed the contents of wiretapped conversations recorded by the Pennsylvania State Police pursuant to an investigation of the respondent, Alfred R. Boettger. On November 17, 1981, the Pennsylvania State Police secured a wiretap permit from the Office of the Pennsylvania Attorney General. Under the permit, a private citizen named Wayne Dickenson consented to a phone tap. On November 19, 1981, the Pennsylvania State Police intercepted a telephone conversation between Boettger and Wayne Dickenson. In the conversation, Boettger revealed his involvement in the acceptance of illegal bets on college football games. The Pennsylvania State Police raided Boettger's home on December 12, 1981. Following the search, Boettger was arrested on charges of bookmaking, pool selling and conspiracy. As a result of a preliminary hearing, Boettger was bound over for criminal court. A motion for discovery was filed on behalf of Boettger on February 9, 1982. The motion included a request for the production of a transcript of the wiretapped conversation. The Northampton County District Attorney in responding to the discovery request attached a copy of the wiretap transcript to his response to discovery which was filed with the Clerk of the Office of Criminal Court.

The Northampton County District Attorney did not direct the clerk to impound the file.

Thom Loverro, the reporter for *The Easton Express* had been providing regular newspaper accounts of the criminal proceedings concerning Boettger. On March 31, 1982, Loverro attended a suppression hearing concerning the wiretap evidence. The court denied the motion to suppress from the bench. Following the hearing, Loverro went to the Clerk of the Office of Criminal Court and requested to see Boettger's file. The Clerk of the Office of the Criminal Court, following normal procedures and noting no restrictions as to access or disclosure, gave the reporter the file for public inspection. Loverro proceeded to take notes directly from the wiretap transcript including direct quotations. Loverro then returned to his office and composed a regular news story which included certain quotes from the transcript. Loverro discussed with his editors whether or not to publish the article containing the quotations from the wiretap transcript. These discussions resulted in the withholding of the publication of the quotations until the hearing judge had issued a written order holding that the recording had been conducted in conformity with state and federal laws. *The Easton Express* published Loverro's article on April 7, 1982. Subsequent to the publication of the article, Boettger entered a plea of nollo contendere to the criminal charges, and was sentenced to pay a criminal fine.

Respondent brought suit against the Easton Publishing Company and its reporter, Mr. Loverro alleging common law invasion of privacy and violation of the Pennsylvania Wiretapping and Electronic Surveillance Control Act of 1978 (the Act), 18 Pa. Cons. Stat. § 5701, et seq. Respondent sought civil damages under § 5725 of the Act which provides for actual damages (of not less than $1,000.00), punitive damages and reasonable attorney's fees and costs. The case went to trial in September of 1983. During the course of the trial respondent withdrew his invasion of privacy claim and dis-

missed Mr. Loverro as a defendant. At the close of the evidence, the court directed a verdict for the respondent on the issue of liability. The court further instructed the jury that they were required to award respondent a minimum of $1,000.00 in liquidated damages under § 5725 (1) of the Act, as well as reasonable attorney's fees and costs. The jury awarded respondent the statutory minimum of $1,000.00 and attorney's fees and costs of $17,409.34. The jury declined to award additional actual damages or punitive damages.

Petitioner filed a motion for judgment notwithstanding the verdict and for a new trial. In its post trial motions, petitioner challenged the constitutionality of the statute. Petitioner argued that the effect of the Act was to civilly punish the publication of material lawfully obtained from public records and that the statute operated as an unconstitutional prior restraint on publication. Petitioner also argued that the common law fair report privilege constituted a defense, and argued that it had relied in good faith on a court order. On March 6, 1984, petitioner's post trial motions were denied.

On appeal, the Pennsylvania Superior Court, relying upon prior decisions of this Court, held that § 5725 of the Act as applied in this case violated the First Amendment and reversed the judgment below. The Supreme Court of Pennsylvania reversed, upholding the constitutionality of the Act and holding that the First Amendment did not protect the publication in question. Petitioners filed a timely Petition for reargument with the Supreme Court of Pennsylvania which was denied on May 18, 1989.

PRELIMINARY STATEMENT

In *The Florida Star* v. *B.J.F.*, ___ U.S. ___, 57 U.S.L.W. 4816 (1989), decided by this Court on June 21, 1989, Justice White in his dissenting opinion identified this case and noted: "The Court's decision today [in *Florida Star*] suggests that this ruling by the Pennsylvania Court was erroneous." *Id.*, 57

U.S.L.W. at 4823 n.4. While Justice White indicated that he would "strike the balance as the Pennsylvania Court did," the majority opinion in *Florida Star* mandates reversal of this case.

Petitioner respectfully requests this court to grant the Petition for Certiorari. Alternatively, because this decision departs dramatically from the long line of decisions from *Cox Broadcasting* to *Florida Star*, petitioner respectfully urges this court to summarily reverse the decision of the Supreme Court of Pennsylvania. *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308, 311-12 (1977) (Petition for Certiorari granted and judgment summarily reversed when court's ruling abridges freedom of the press).

I. THE CHALLENGED STATUTE WHICH IMPOSES CIVIL LIABILITY FOR PUBLISHING TRUTHFUL INFORMATION LAWFULLY OBTAINED FROM STATE COURT FILES OPEN TO THE PUBLIC VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS.

The decision of the Supreme Court of Pennsylvania in this case departs dramatically from well settled First Amendment principles as set forth in five decisions of this Court. The case before the bar is another in the line of cases which began with *Cox Broadcasting Corp.* v. *Cohn* 420 U.S. 469 (1975), continued with *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308 (1977), *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978), *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979), and culminated in *The Florida Star* v. *B.J.F.*, ___ U.S. ___, 57 U.S.L.W. 4816 (1989).

The decision of the Supreme Court of Pennsylvania conflicts most dramatically with this Court's recent decision in *Florida Star*. The facts in the case at bar and those of *Florida Star* are closely analogous. In this case, a reporter, in viewing a court file which was clearly accessible to the general public, discovered information concerning a wiretapping operation.

This information was later published in *The Easton Express*, a daily newspaper owned by the Easton Publishing Company. In *Florida Star*, this Court held that the publication of a rape victim's name which was ascertained from police reports made available to the general public, and which was truthful information, was constitutionally protected speech and that the imposition of civil damages pursuant to a statutory enactment violated the First Amendment due to the absence of a state interest of the highest order. As in the instant case, *Florida Star* involved a state statute which authorized awarding civil damages upon a finding that a publication violated the statute. In striking down the Florida statute, this Court held that: "where the government itself provided the information to the media, it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech." *Id.*, at 57 U.S.L.W. at 4817. This principle clearly controls the instant case. The dictates of *Florida Star* mandate that the Commonwealth of Pennsylvania could have protected the privacy interest of the individual involved in this case in a far less restrictive manner than by civilly punishing the publication of truthful speech.

The prior decisions of this Court, which were considered, and rejected by the Supreme Court of Pennsylvania, similarly mandate reversal. In *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469 (1975), this Court determined that a state cause of action for damages for invasion of privacy in connection with the publication of the name of a deceased rape victim which was ascertained in a court file available for public inspection violated the First and Fourteenth Amendments of the United States Constitution. In making this determination, this Court considered the direct confrontation between the constitutional freedoms of speech and press and the claims of the right to privacy. *Id.* at 489. This Court specifically held in *Cox Broadcasting* that the interests in privacy fade where the information appears in the public record. *Id.* at 494. In *Oklahoma Publishing Co.* v. *District*

Court, 430 U.S. 308 (1977), this Court summarily reversed a pretrial order of a state court enjoining the news media from publishing, broadcasting and disseminating the name or picture of a child involved in a juvenile proceeding. As in this case, the reporters in *Oklahoma Publishing* determined the identity of the individual from access to files which were available for the viewing of the general public and which was not restricted by the court or any other public agency. In *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978), this Court adjudged a statute unconstitutional which imposed criminal penalties for divulging truthful information regarding proceedings before a confidential state judicial review commission. In *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979), this Court reaffirmed its reasoning in the decisions heretofore described by holding as unconstitutional a state statute which made it a crime for a newspaper to publish the name of a juvenile charged as a youthful offender without the written approval of a court as this punished the truthful publication of information. In *Daily Mail*, this Court noted that whether a statute is viewed as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information was not dispositive because both require the highest degree of state interest to sustain their validity. *Id.* at 101-102.

The Constitutional principles announced in these cases were further refined in *Florida Star*. Therein, this Court reaffirmed the well established rule that the First and Fourteenth Amendments protect the publication of information from government files which is lawfully obtained. The case before this Court presents an even more compelling factual basis for protecting the publication in question because, as in *Cox Broadcasting*, the information was obtained from "courthouse records open to public inspection" *Id.*, 57 U.S.L.W. at 4819, citing *Cox Broadcasting* v. *Cohn*, 420 U.S. 469 (1975). A principal reason this Court gave for invalidating the challenged damage award in *Cox Broadcasting* was the important role played by the press in "subjecting criminal proceedings

to public scrutiny and thereby guaranteeing their fairness." *Florida Star*, 57 U.S.L.W. at 4819, citing, *Cox Broadcasting* 420 U.S. at 492-93.

In *Cox Broadcasting* Justice White clearly recognized that considerations of personal privacy are greatly diminished once information appears in public court records, 420 U.S. at 494-95. Justice White further reasoned that making public records generally available to the media, while allowing their publication to be punished would invite "self censorship and very likely lead to the suppression of many items that . . . should be made available to the public." *Id.*, at 496. This case falls squarely within the strictures of *Cox Broadcasting*; which clearly prohibits the punishment of truthful publication of information lawfully obtained from public court records.

The Pennsylvania Statute, 18 Pa. Cons. Stat. § 5725 must fall under the principles announced by this Court in *Florida Star*. "Where a newspaper publishes truthful information which it has lawfully obtained, punishment may be imposed, only when narrowly tailored to a state interest of the highest order." __ U.S. __, 57 U.S.L.W. at 4820. The analysis in *Florida Star* is based upon this Court's holding in *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979). *Daily Mail*, sets forth the criteria for First Amendment protection in this context. First, the information must be "lawfully obtained." Second, punishment of the publication must be to further a "state interest of the highest order." Third, the court must consider the "timidity and self censorship" inherent in a state statute which punishes the publication of accurate information obtained from public court files. *Florida Star* ___ U.S.___, 57 U.S.L.W. at 4818-19.

The application of the *Daily Mail* principles as reannounced in *Florida Star* to the facts of this case clearly mandates reversal of the decision below.

A. THE NEWSPAPER LAWFULLY OBTAINED TRUTHFUL INFORMATION CONCERNING A MATTER OF PUBLIC SIGNIFICANCE FROM PUBLIC COURT RECORDS

It is undisputed that the newspaper account of the wiretap conversation involving the respondent was a fair and accurate representation of the transcript which appeared in the court files of the criminal proceedings in which respondent Boettger was a defendant. Boettger's conversation was intercepted pursuant to a statutorily authorized wiretap. Boettger unsuccessfully sought to suppress the wiretap evidence and he subsequently entered a plea of nolo contendere to charges of conspiracy to commit bookmaking and pool selling. Upon his conviction, respondent was sentenced to pay a criminal fine. Prior to the suppression hearing, the District Attorney in charge of the case placed a transcript of the wiretap conversation into the case file making the transcript available to the public. Immediately following the suppression hearing Thom Loverro, the reporter for *The Easton Express*, requested access to the court file and was presented a copy of the file for review by the clerk. Upon reviewing the file, Lovarro took extensive notes, returned to his office and began writing a story based upon the excerpts taken from the wiretaps. The story appeared several days later, on April 7, 1982, following the court's issuance of an order denying the suppression motion.

The judicial system placed the transcript of the intercepted communication into a public file. Because of this *public* disclosure, the transcript became accessible to all members of the community, including the press. The information was clearly a public record which was "lawfully obtained."

There can be no doubt that the subject of the article in question was a "matter of public significance." This Court has repeatedly stressed the importance of public access to judicial proceedings and public access to information concerning those proceedings. In *Richmond Newspapers, Inc.* v.

Virginia, 448 U.S. 555 (1980), this Court held that the First and Fourteenth Amendments guarantee the public the right to attend criminal trials. *Id.*, at 583. In so doing this Court emphasized that the First Amendment's core purpose is to assure freedom of communication on matters relating to the function of government generally, and criminal trials specifically.

> Plainly it would be difficult to single out any aspect of higher concern and importance to the people than the manner in which criminal trials are conducted.

Id., at 575.

Similarly, in *Nebraska Press Ass'n.* v. *Stuart*, 427 U.S. 539 (1976), this Court rejected the use of a prior restraint to prohibit the press from reporting the details of a crime, its investigation, and what transpired in an open courtroom.

These cases make it clear that protecting the free-flow of information concerning the functioning of our criminal justice system is a central purpose of the First Amendment. The publication of the information in this case is clearly of the highest public significance, addressing as it does the prosecution of a member of the community charged with violating criminal statutes prohibiting bookmaking, and other forms of gambling activities.

B. THE CHALLENGED STATUTE DOES NOT PROTECT A STATE INTEREST OF THE HIGHEST ORDER

Protection of the privacy rights of an individual accused and subsequently convicted of a criminal offense does not rise to the level of a "state interest of the highest order," particularly where, as here, those privacy rights were previously violated by the public officials charged with safeguarding those rights in the first instance. This proposition was made clear in *Florida Star*.

[W]here government itself provides information to the media, it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech. That assumption is richly borne out in this case. B.J.F.'s identity would never have come to light were it not for the erroneous, if inadvertent, inclusion by the Department of her full name in an incident report made available in a press room open to the public. Florida's policy against disclosure of rape victims' identities, reflected in Section 794.03, was undercut by the Department's failure to abide by this policy. Where, as here, the government has failed to police itself in disseminating information, it is clear under *Cox Broadcasting*, *Oklahoma Publishing*, and *Landmark Communications* that the imposition of damages against the press for its subsequent publication can hardly be said to be narrowly tailored means of safeguarding anonymity. See *supra*, at 9. Once the government has placed such information in the public domain, "reliance must rest upon the judgment of those who decide what to publish or broadcast," *Cox Broadcasting*, 420 U.S., at 496, and hopes for restitution must rest upon the willingness of the government to compensate victims for their loss of privacy, and to protect them from the other consequences of its mishandling of the information which these victims provided in confidence.

That appellant gained access to the information in question through a government news release makes it especially likely that, if liability were to be imposed, self-censorship would result. Reliance on a news release is a paradigmatically "routine newspaper reporting techniqu[e]." *Daily Mail*, 443 U.S., at 103. The government's issuance of such a release,

> without qualification, can only convey to recipients that the government considered dissemination lawful, and indeed expected the recipients to disseminate the information further.

___ U.S. ___, 57 U.S.L.W. at 4817-18.

All of the factors identified by this Court in *Florida Star* are present in this case. *The Easton Express* relied upon a similar "paradigmatically 'routine newspaper reporting technique'" namely, examination of court files available to the public in the office of the clerk. Petitioner was entitled to rely upon the public availability of the wiretap transcript and should not be subject to civil liability because the government abrogated its statutory duties to maintain the confidentiality of certain classes of documents.[2]

The statute fails to meet the "state interest of the highest order" test for yet a second reason. The interest sought to be protected, presumably the "privacy" of persons who are the subject of criminal prosecutions, is a far less compelling interest than the protection of the privacy of a rape victim. The latter interest was held to be insufficient to meet the First Amendment standard in *Florida Star*.

As Justice White pointed out, the plaintiff in *Florida Star* was the victim of a traumatic and violent crime. Following the publication of her name, she received "harassing

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[2]The trial court was strongly critical of the district attorneys failure to comply with the statute.

> Unfortunately, the District Attorney's safekeeping of the recordings *was in total noncompliance with the governing statute*. No application was ever made for their sealing under the direction of the court. Moreover, no attempt was made to place the records in the custody of court; nor, was the court given the opportunity to monitor disclosure. See *Wiretapping and Electronic Surveillance Control Act*, 18 Pa. C.S.A. §5714(b) and §5715 (emphasis added).

Appendix D at 2d, n.2.

phone calls, required mental health counseling, was forced to move from her home and was even threatened with being raped again." *Id.*, 57 U.S.L.W. at 4821 (White, J., dissenting). The plaintiff in *Florida Star* was a highly vulnerable victim of a crime who suffered actual damages as a consequence of the publication.

By contrast, the respondent in this case presents a far less compelling case. Far from being an innocent victim, respondent Boettger was the perpetrator of criminal activities for which he was convicted and sentenced to pay a criminal fine. Moreover, the jury found that respondent suffered no actual damages and was not entitled to punitive damages.

The criminal proceedings against the respondent were the subject of extensive press coverage prior to the publication of the wiretap transcript. In the overall context of the criminal proceedings resulting in the conviction of the respondent, the publication of the actual telephone conversation which formed the basis of the case against him cannot be viewed as a substantial intrusion into his privacy. The protection of individual privacy in this context is clearly not a "state interest of the highest order."

C. A CIVIL ACTION PUNISHING THE PUBLICATION OF TRUTHFUL INFORMATION LAWFULLY OBTAINED FROM COURT RECORDS WILL RESULT IN SELF-CENSORSHIP

As this Court held in *Florida Star*, civilly punishing the publication of information obtained from public records and published in reliance thereon will inevitably lead to self-censorship.

> A third and final consideration is the "timidity and self-censorship" which may result from allowing the media to be punished for publishing certain truthful information. *Cox Broadcasting, supra*, at 496. *Cox Broadcasting* noted this concern with overdeterrence in the context of information made

> public through official court records, but the fear of excessive media self-suppression is applicable as well to other information released, without qualification, by the government. A contrary rule, depriving protection to those who rely on the government's implied representations of the lawfulness of dissemination, would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication. This situation could inhere even where the newspaper's sole object was to reproduce, with no substantial change, the government's rendition of the event in question.

___ U.S. ___, 57 U.S.L.W. at 4819

There can be no question that the newspaper in this case relied upon the public availability of the wiretap transcript. A rule requiring the public and the press to second guess the actions of the district attorney's office in making materials available in public files would inevitably lead to self censorship.

Other federal and state courts have been virtually unanimous in adhering to the constitutional principles announced by this Court in *Cox Broadcasting, Oklahoma Publishing Co., Landmark Communications,* and *Daily Mail. Worrell Newspapers of Indiana, Inc.* v. *Westhafer*, 739 F.2d 1219, 1221, 1223 (7th Cir. 1984) (criminal statute prohibiting publication of names of person indicted under seal violates First Amendment); *WXYZ, Inc.* v. *Hand*, 658 F.2d 420 (6th Cir. 1981) (only the highest state interest justifies statute prohibiting publication of name of victim of sexual offense); *State* v. *Stauffer Communications, Inc.*, 592 P.2d 891 (Kan. 1979) (First Amendment prohibits criminal statute punishing publication of facts from public records concerning arrest warrants); *Ayers* v. *Lee Enterprises*, 561 P.2d 998 (Or. 1977) (privacy action based upon state's Public Records Act prohibiting disclosure of victim's name violates First Amendment).

This Court and other courts throughout this country have overwhelmingly adopted the well settled constitutional principles rejected by the Supreme Court of Pennsylvania in this case.

II. THE CHALLENGED STATUTE'S IMPOSITION OF STRICT LIABILITY IN THE FORM OF AN IRREBUTABLE PRESUMPTION OF INVASION OF PRIVACY VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS

This Court has consistently held that strict liability in any form is impermissible where First Amendment interests are involved. This principle was clearly set forth in *Florida Star*.

> A second problem with Florida's imposition of liability for publication is the broad sweep of the negligence *per se* standard applied under the civil cause of action implied from § 794.03. Unlike claims based on the common law tort of invasion of privacy, see Restatement (Second) of Torts § 652D (1977), civil actions based on § 794.03 require no case-by-case findings that the disclosure of a fact about a person's private life was one that a reasonable person would find highly offensive. On the contrary, under the *per se* theory of negligence adopted by the courts below, liability follows automatically from publication. This is so regardless of whether the identity of the victim is already known throughout the community; whether the victim has voluntarily called public attention to the offense; or whether the identity of the victim has otherwise become a reasonable subject of public concern — because, perhaps, questions have arisen whether the victim fabricated an assault by a particular person.

___ U.S. ___, 57 U.S.L.W. at 4820.

Like the statute in *Florida Star*, the Pennsylvania statute creates an irrebuttable presumption that the plaintiff's privacy interests have been violated from the fact of publication alone.[3] This presumption precludes the case-by-case analysis of the reasonableness of the publication in light of surrounding publicity.

In *Florida Star*, Justice Marshall characterized the scheme of strict liability as engendering the perverse result that truthful publications challenged pursuant to this cause of action are less protected by the First Amendment than even the least protected defamatory falsehoods: those involving purely private figures, where liability is evaluated under a standard, usually applied by a jury, of ordinary negligence. *Id.*

Justice Marshall also recognized the close relationship between constitutional protection available to libel defendants and those applicable to publishers of truthful information.

In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court rejected the common law rule of strict liability in libel actions involving private persons.

> Our decisions recognize that a rule of strict liability that compels a publisher or a broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.

---

[3]While § 5703 of the Act imposes the narrow "scienter" requirement of a "willful disclosure" of the contents of a wire communication, strict liability remains inherent in the presumption of an invasion of privacy which is presumed from the fact of publication. Moreover, the publisher of the newspaper in *Florida Star* clearly knew that he was publishing the name of a rape victim and therefore willfully disclosed the information just as the newspaper in this case willfully disclosed the wiretap transcript.

Id., at 340. The *Gertz* Court went on to characterize its decision in *New York Times Co.* vs. *Sullivan*, 376 U.S. 254 (1964), as a rejection of "the *common law* of strict liability for libel and slander." *Id.*, at 344.

While the Pennsylvania statute requires a "willful disclosure," it does not require proof of any of the other elements of invasion of privacy. And most significantly, *truth* is not a defense under § 5725.

In another recent examination of First Amendment principles limiting governmentally imposed tort sanctions against speech and press, this Court squarely rejected the imposition of strict liability, reasoning that "a rule that would impose strict liability on a publisher for false factual assertions would have an undoubtedly 'chilling' effect on speech . . . " *Hustler Magazine, Inc.* v. *Falwell*, ____U.S.____, 99 L.Ed 2d 41, 50 (1988).

This case proceeded solely upon a statutorily based strict liability theory. The common law invasion of privacy claim was voluntarily dismissed by the respondent at trial. Finding that *The Easton Express* article fell within the purview of Section 5725, the trial judge directed a verdict for respondent on the question of liability and issued a binding instruction to the jury with respect thereto. Pursuant to the statute the jury was further instructed that they were required to award respondent not less than $1,000 in liquidated damages. The jury found that respondent had suffered no actual damages and was not entitled to punitive damages in connection with publication of the wiretap transcript summary. Respondent was not required to prove any of the elements of invasion of privacy and petitioner was not permitted to argue that its publication was reasonable and unoffensive in light of the publicity surrounding Boettger's arrest, denial of his suppression motion, and subsequent conviction.

The statute in this case which imposes strict liability in the form of an irrebutable presumption for truthful speech, is

contrary to those rulings which were adopted in order to provide breathing space to avoid media self-censorship. Our constitutional heritage carefully protects each step in finding and publishing the truth. That heritage allows some defamatory speech to occur. The Supreme Court of Pennsylvania has departed from this heritage in upholding, as constitutional under our First Amendment, a statute which imposes strict liability in the form of an irrebutable presumption for publishing truthful information.

> Acknowledging the power of government to regulate the content of the news invites its use and admits no limiting principle.
>
> It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

West Virginia State Bd. of Educ. v. *Barnett*, 319 U.S. 624, 641 (1943).

CONCLUSION

Prior decisions of this Court clearly prohibit civil and criminal sanctions for the publication of truthful information obtained from public court files or information obtained from state agencies. The Supreme Court of Pennsylvania's opinion has validated such a statute. Pennsylvania Code, 18 Pa. Cons. Stat. § 5725, is clearly unconstitutional under prior precedent from this Court. If allowed to stand, the holding below will continue to have a severe negative impact upon

news gathering and publishing activities which are clearly protected by the First Amendment. For these reasons, this Court is respectfully requested to grant the Petition for Certiorari and give this case full consideration on the merits.

Alternatively, this Court is requested to grant certiorari and summarily reverse the holding of the Supreme Court of Pennsylvania in light of this Court's opinion in *Florida Star* v. *B.J.F.* Where a court order or holding abridges freedom of the press in violation of the First and Fourteenth Amendments, summary reversal is particularly appropriate. *Oklahoma Publishing Company* v. *District Court*, 430 U.S. 308, 311-12 (1979)(Petition for Certiorari granted and judgment summarily reversed where court's order abridges freedom of the press).

Respectfully submitted,

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APPENDIX A

IN THE

Supreme Court

OF PENNSYLVANIA
EASTERN DISTRICT

ALFRED R. BOETTGER, *Respondent* v. THOM LOVERRO AND EASTON PUBLISHING COMPANY, *Petitioner*	No. 31 E.D. Appeal Dkt. 1987 Petition for Reargument and Application for Relief Filed: May 18, 1989

ORDER

PER CURIAM

The Petition for Reargument and Application for Relief are denied.

Messrs. Justice Larsen and Justice McDermott did not participate in the consideration or decision of this case.

TRUE COPY FROM RECORD
ATTEST: May 19, 1989

/s/

PATRICK TASSOS,
Deputy Prothonotary
Supreme Court of Pennsylvania
for the Eastern District

APPENDIX B

IN THE

Supreme Court

OF PENNSYLVANIA
EASTERN DISTRICT

ALFRED R. BOETTGER, *Appellant*	No. 31 E.D. Appeal Docket 1987
v.	
THOM LOVERRO AND EASTON PUBLISHING COMPANY	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Order of the SUPERIOR COURT, be, and the same is hereby reversed and the judgment of the Court of Common Pleas of Northampton County is reinstated.

/s/

MARLENE F. LACHMAN, Esq.
Prothonotary

Dated: March 8, 1989

IN THE

Supreme Court

OF PENNSYLVANIA
EASTERN DISTRICT

ALFRED R. BOETTGER, *Appellant* v. THOM LOVERRO AND EASTON PUBLISHING COMPANY, *Appellees*	No. 31 E.D. Appeal Docket 1987 Appeal from the Order of the Superior Court in Nos. 984 and 1035 Philadelphia, 1984 Entered January 3, 1986, Reversing the Order of the Court of Common Pleas of Northampton County in No. 1982-C-2846 Entered March 6, 1984, Denying Plaintiff's and Defendants' Motion for Post-Trial Relief and Entering Final Judgment on the Verdict 349 Pa. Super. 134, ___ A.2d ___ (1986) ARGUED: November 10, 1987

OPINION

JUSTICE ZAPPALA FILED: March 8, 1989

In this appeal we review an Order of the Superior Court reversing an Order of the Court of Common Pleas of Northampton County denying all parties' cross-motions for post-trial relief and entering final judgment on a jury verdict rendered in favor of Appellant. That verdict resulted from a civil action brought by Appellant against Appellee, Easton Pub-

lishing Company and one of its reporters, Thom Loverro, under § 5725 of the Wiretapping and Surveillance Control Act (Act) 18 Pa.C.S. § 5701 et seq. Section 5725 provides a civil cause of action for damages incurred due to the unlawful disclosure or use of a wire or oral communication obtained pursuant to or in violation of the Act. The trial court, in rejecting Appellee's motion, took the position that the Act created a limited right of disclosure which previously had not existed and therefor, notwithstanding the status of Appellee as "the press", "[the Legislature] evidences an overiding legislative concern for the protection of privacy. Thus, we believe that *all* disclosures and uses of wiretap information must be in strict compliance with the Act." Opinion of Common Pleas Court at 8. (Filed, March 6, 1984) (emphasis added).

The Superior Court, in reversing the trial court, created an implied exemption from liability as to the media for violation of the disclosure provisions where the disclosure was of legitimate public concern and lawfully obtained from court records accessible to the public. We granted allocatur to determine, as a question of first impression, whether or not such an exemption should be read into § 5725. After carefully reviewing the provisions of the Act, we hold that the Act makes no provision for a media exemption nor need one be implied.

Both lower courts found the facts to be largely undisputed and those relevant to the disposition of this appeal indicate that on November 17, 1981, the State Police secured a wiretap permit from the Attorney General pursuant to § 5704(2)(ii) of the Act. At the request of the State Police, a private individual, known to Appellant, consented to a telephone tap between himself and the Appellant. Shortly thereafter, the State Police intercepted a telephone conversation between Appellant and the consenting individual which revealed the Appellant's involvement in illegal betting activities on college football games. Based upon the information

obtained from the intercept, the State Police raided Appellant's home and charged him with bookmaking, pool selling and conspiracy. After being held for court on the charges, Appellant filed a timely motion for discovery, requesting the District Attorney produce a transcript of the intercepted call. Inadvertently, but in violation of the disclosure section of the Act, 18 Pa.C.S. § 5717(b), the District Attorney attached a copy of the transcript to his answer and filed it with the clerk of courts. No attempt was made by the District Attorney to direct the clerk to impound the file as required by § 5714(b) of the Act.

On March 31, 1982, a suppression hearing was held on Appellant's motion to suppress the introduction of the intercepted communication. One of the observers present at the hearing was Thom Loverro, a reporter for the Easton Express, a newspaper owned by Appellee's publishing company. Loverro expected that the hearing would disclose the contents of the wiretap, however, the hearing judge disposed of the motion without such disclosure. Following the hearing, Loverro went to the office of the clerk of court and requested the case file. The file was made available to Loverro, who discovered the transcript of the interception which had been attached to the District Attorney's answer to Appellant's discovery request. Loverro made extensive notes on the contents of the transcript and subsequently wrote a story based upon those notes. He withheld publication of the story for approximately seven days, however, while he discussed the matter with his superiors. On April 7, 1982, the managing editor approved publication and the article was published with excerpts of Loverro's notes from the transcript.

After the publication, Appellant filed a lawsuit against Easton Publishing Company and Loverro predicated upon the common law tort of invasion of privacy and the statutory civil action created by § 5725. Subsequently, Loverro was dropped as a defendant and the common law invasion of privacy count was withdrawn. Following trial on the action,

the trial judge directed a verdict in favor of Appellant as to the issue of liability. The jury then returned a verdict of $1,000 in actual damages, no punitive damages, and $17,409.43 in attorney's fees. The court en banc dismissed Appellant's post-trial assertion that punitive damages were mandatory, and likewise dismissed Appellee's motion for judgment n.o.v., attacking the directed verdict on various grounds.

In reversing the court en banc's interpretation of the Act, the Superior Court reasoned that while Appellee had indeed violated the Act by its publication of the article containing portions of the transcript, to sustain the media's liability for that violation would be a constitutional transgression and therefore deemed it necessary to imply a "media exemption" in the Act to preserve its constitutionality. Our reading of the Act together with other relevant Pennsylvania precedent, however, leads us to conclude that the exemption created by the Superior Court is unnecessary.

Pennsylvania's Wiretapping and Surveillance Control Act, is a pervasive scheme of legislation which suspends an individual's constitutional right to privacy only for the limited purpose of permitting law enforcement officials, upon a showing of probable cause, to gather evidence necessary to bring about a criminal prosecution and conviction. The statute sets forth clearly and unambiguously by whom and under what circumstances these otherwise illegal practices and their derivitive fruits may be used. Section 5703 of the Act, sets

forth the specific prohibition against the interception and disclosure of these materials

> **§ 5703. Interception, disclosure or use of wire or oral communications**
>
> Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he:
>
> . . .
>
> (2) *willfully discloses* or endeavors to disclose to any other person the contents of any wire or oral communication or evidence derived therefrom, knowing, or *having reason to know* that the information was obtained through the interception of a wire or oral communication; . . . (emphasis added)

In addition, § 5717 of the Act sets forth the exclusive and unequivocal circumstances under which disclosure of intercepted wire or oral communications are permitted. They are:

> *(a) Investigative activities.*
> — Any investigative or law enforcement officer . . . may disclose such contents or evidence to another investigative or law enforcement officer or make use of such contents . . .
>
> . . .
>
> *(c) Otherwise authorized personnel.*
> — Any person who, by any means authorized by the laws of another state or the Federal Government, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents or evidence to an investigative or law enforcement officer and may disclose such contents or evidence where otherwise admissible while giving testimony under oath or affirmation in any proceeding in any court of this Commonwealth.

Additionally, § 5725 of the Act provides for a civil cause of action for the unlawful interception, disclosure or use of wire or oral communications. That section provides:

> . . . Any person whose wire or oral communications is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept disclose or use such communication . . .

Section 5715 requires that any transcript derived from such electronic surveillance be sealed. Section 5725 provides a defense to the civil action if the defendant acted in good faith reliance on a court order or the provisions in this chapter.

The Superior Court, interpreting the above sections of the Act, agreed with the lower court determination that Appellee's reporter was not a person statutorily authorized to disclose the communications in question. In publishing the newspaper article containing quotations from the transcript, Appellee therefore both disclosed and used Appellant's intercepted conversation in violation of the Act.

In addition, the court found that the specific and only defense provided by § 5725(c) was not available to Appellee inasmuch as there existed no court order directing the clerk to unseal the transcript and make it available to either Appellee or the general public. In these findings we concur. We also accept the Superior Court's determination that §611 of the Restatement (2nd) of Torts, Fair Report Privilege, is not applicable to Appellee inasmuch as the transcript did not satisfy the §611 requirement that the published defamatory material be "contained in a report of an official action or proceeding or of a meeting open to the public and dealing with matters of public concern". Id.

We depart from the rationale of the Superior Court, however, where it concludes that it must, of necessity, fashion

an implied privilege for the sole benefit of the media in order to maintain the constitutionality of the Act. In support of its holding, the court relies on federal Supreme Court precedent set forth in *Smith* v. *Daily Mill Publishing Company*, 433 U.S. 102 (1979); *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469 (1979); *Landmark Communications Inc.* v. *Virginia*, 435 U.S. 829 (1978) and *Oklahoma Publishing Company* v. *District Court of Oklahoma*, 430 U.S. 308 (1977).

In predicating its decision on this line of cases, the Superior Court concluded that the facts of the instant case were indistinguishable from the factual situations presented in those cases. For the reasons that follow, we disagree.

In *McLaughlin* v. *Philadelphia Newspapers Inc.*, 465 Pa. 104, 348 A.2d 376 (1975), this Court held that under the First Amendment to the United States Constitution, the press enjoyed no greater right of access to information than that afforded to the general public. There is cogent reasoning for this principle; for what is the media if not the eyes, ears and, at times, the alter ego of the public? As such, there is no justification to allow the media a unique prerogative to trespass where the general populace is barred. Were we to affirm the decision of the Superior Court, we would effectively be bestowing upon the media a preeminent right to which they are not entitled. The Act is clear as to who is authorized to violate a citizen's right to privacy. That authority is limited to the enumerated law enforcement officials functioning in conformity with the limited purpose of the Act.

Having determined that a privilege for the media does not appear on the face of the Act, we must determine whether the Act, when applied to the facts before us, can be differentiated from the *Cox*, *Landmark Communications* line of cases in a manner that will preserve the vitality of the Act.

The common thread running through the *Cox* line of cases is the Constitutional tenet that a state may not impose prior restraint or penal sanction upon the media for publish-

ing lawfully obtained, truthful information contained in official court records open to public inspection. In *Cox*, the Supreme Court invalidated a Georgia statute which prohibited the news media from publishing or broadcasting the name or identity of a rape victim and provided misdemeanor penalties for its violation. A reporter for Cox had obtained the name of a rape victim by examining copies of indictments handed to him in open court by a clerk, and subsequently caused the indentity of the victim to be broadcast; an act for which Cox was sued civilly by the victim's father. The Court, in pronouncing the statute constitutionally infirm, indicated that the operant factor in its holding was that the prohibited sanction applied to information "from judicial records which are maintained in connection with a public prosecution and *which themselves are open to public inspection.*" 420 U.S. at 491 (emphasis added) (In effect, the statute prohibited the media from disclosing what was otherwise public knowledge).

Similarly, in *Oklahoma Publishing Co.*, the Court struck down legislation prohibiting publication of the name and picture of a juvenile defendant. The identity of the juvenile was acquired by reporters solely through their presence at open court proceedings. Correspondingly, in *Smith*, the Court held that West Virginia could not punish truthful publication of an alleged juvenile delinquent's name where the information was lawfully obtained. In this instance, the identity was gleaned by monitoring police radio frequencies and querying eyewitnesses to the crime. Finally, in *Landmark Communications*, the case most analogous to the instant facts, the Court held that Virginia could not impose criminal sanctions on the media for publishing confidential information relating to judicial disciplinary proceedings in violation of its state constitution and statutory law.

Having thoroughly examined the reasoning behind these decisions, it is clear that the case before us is sui generis and therefore does not require the result produced below. Initially, the present case is distinguishable from the *Cox* ratio-

nale by virtue of the fact that the information sought to be prohibited in those cases was of a type legally and publicly obtainable either from official court records *intentionally* placed in the public domain, or from information readily obtainable through attendance in open court. In contrast, in this case the information was neither readily obtainable in open court nor *intentionally* placed in records accessible to the general public. Since the Act requires that all transcripts be sealed until such time as there is disclosure, it cannot be said that the transcript obtained by Appellee's reporter was officially placed in the court record and intended to be accessible to the public. The statute clearly sets forth the mandatory sealing of the transcript and its ability to be disclosed by one not authorized *only* upon a court order. *See* 18 Pa.C.S. §§5715 and 5725(c).

Unfortunately, the attachment of the transcript to the District Attorney's answer to the discovery motion corrupts the straightforward disposition of this case. We are not inclined however to obviate the otherwise confidential nature of the transcript based solely upon its happenstance discovery by Appellee's reporter in an otherwise public record. It is of legal and public record that information obtained through the Act *shall* be sealed and that "[t]he presence of the seal provided by this section, *or a satisfactory explanation for its absence*, shall be a *prerequisite* for the disclosure of the contents of any wire or oral communication, or evidence derived therefrom, under §5717(b)." 18 Pa.C.S. §5714 (emphasis added).

Since the statute neither prohibits nor sanctions the mere possession of transcripts, but only their disclosure, the very possession of the notes from the transcript by Appellee and/or its reporter did not constitute a violation until such time as the actual disclosure of this information was accomplished.

The more proximate and difficult holding we must reconcile with the case before us is the circumstances presented

in *Landmark Communications, supra.* In *Landmark*, confidential information concerning the disciplinary actions taken against a judge by the Virginia Judicial Inquiry and Review Commission was obtained in violation of a Virginia code which made it unlawful to divulge the identification of a judge when he was the subject of an investigation and hearing by the commission. The statute provided criminal penalties for its violation. The United States Supreme Court defined the narrow and limited question as "whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the judicial inquiry and review commission. 435 U.S. at 837 (footnote omitted). The court held that it did not and based its decision on the fact that neither the Commonwealth's interest in protecting the reputation of its judges nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech here at issue. Interestingly, the court declined to completely answer the broader question, unquestionably germane to the present inquiry and first acknowledged, but not decided, in *Cox*, which asks whether the publication of truthful information, withheld by law from the public domain, enjoys a similar privilege as does public information released to the general public in official court records? This is the precise question now before us. The *Landmark* court declined to address all the implications of this question but would decide it only in relation to the unique circumstances presented there, to wit, whether that specific publication enjoyed such a privilege.

It is clear from our reading that the holding in *Landmark* is, of necessity, limited to its particular facts. The operant factors in the decision were a penal statute and the balancing of First Amendment rights versus the state's interest in protecting the reputation of its judges and maintaining the institutional integrity of its court.

Distinguishing the case before us from *Landmark*, we note here, we are not dealing with a penal sanction but a civil one.[1] Additionally, the interest sought to be balanced in *Landmark*, the right to the reputation of judges and maintaining the integrity of the courts weighs much more heavily upon the side of First Amendment privilege, that interest being directly related to government and the public's interest in scrutiny of its function.

Before us, however, are two equally weighted fundamental interests which, because of their unique nature, we find operate to tip the scale in the opposite direction of the counterpoise established in *Landmark*. Those interests are the right of a citizen of this Commonwealth to enjoy privacy and, the specifically enumerated right of our citizens to protect their reputation. Pennsylvania Constitution, Article I, §11.

The right to privacy in the present case is a much stronger interest than the privacy interest weighed by the United States Supreme Court in *Cox* and its progeny. This is true for the privacy interests in *Cox* were viewed in terms of the disclosure of information otherwise of public record. In contrast, the privacy interest we now consider consists of information gathered in temporary derogation of a Pennsylvania citizen's right to privacy and protected by our Commonwealth through a pervasive legislative scheme uncompromisingly delineating and limiting its collection and use. Weighing these interests against those contained in the First Amendment's guarantee of freedom of the press, we perceive it readily apparent that Pennsylvania's interest in protecting its citizen's rights far outweighs the negligible effect the Act's blanket prohibition on disclosure creates. To understand our rationale in minimalizing the interest of the newspaper, it is important to bear in mind that, but for the

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[1]We note parenthetically that the Act does provide criminal sanctions for its violation. 18 Pa.C.S.A. §5703, 5719, however, the Appellee not having been charged under that section, the question is reserved for another day.

enactment of the Act both the collection and dissemination of electronically obtained conversations would be clearly and *absolutely* prohibited. From this we reason that *only* when the protected information is disseminated either through an order of court unsealing it or through its use as evidence in an open court proceeding does the media's interest rise above those of the Commonwealth and its citizens.

Because we find no fault with the explicit language of the Act, we hold that information validly gathered pursuant to the provisions of the Act may not be disclosed, except under the limited mechanisms found in the Act, even though one not authorized to disclose such information obtains it through inadvertance or other means.

Therefore, the order of the Superior Court is reversed and the judgment of the Court of Common Pleas of Northampton County is reinstated.

Messrs. Justice Larsen and Justice McDermott did not participate in the consideration or decision of this case.

Mr. Chief Justice Nix files a Dissenting Opinion.

IN THE

Supreme Court

OF PENNSYLVANIA
EASTERN DISTRICT

ALFRED R. BOETTGER, *Appellant* v. THOM LOVERRO AND EASTON PUBLISHING COMPANY	No. 31 E.D. Appeal Dkt. 1987 Appeal from Order of Superior Court entered January 3, 1986, at Nos. 984 and 1035 Philadelphia 1984, Reversing Order of Court of Common Pleas of Northampton County, Civil Division, entered March 6, 1984, at No. 1982-C-2846 ___ Pa. Super. ___, ___ A.2d ___ (1986) ARGUED: November 10, 1987

DISSENTING OPINION

NIX, C. J. FILED: March 8, 1989

I dissent.

Today the majority holds that a newspaper is liable in a civil action under Section 5725 of the Wiretapping and Surveillance Control Act (Act), 18 Pa.C.S. § 5725, for publishing the contents of an intercepted communication obtained by one of its reporters from a public court file. The majority's disposition of this appeal ignores a vital fact in these circumstances, *i.e.*, that the transcript was publicly disclosed by the district attorney, who mistakenly attached it to a public court document.

The Act provides for the judicial maintenance of the secrecy of the recordings and supporting documents of intercepted communications in Sections 5714-5716. The recordings, along with any transcripts, orders and reports, must be sealed, held in custody, and disclosed only under certain conditions.

The disclosure in this case resulted from the inadvertence of the judicial system. Having placed the transcript within the public file, the members of the press, like anyone else in the community, had access to it and had no personal obligation to maintain the secrecy of the documents. The fact that the transcript is supposed to be kept secret is not directed at the person who accesses it in a public file, but is directed at the persons entrusted to keep it secret. That is the judicial system.

Thus, the burden for securing the secrecy of the transcripts was placed by statute on the judicial system which failed, in this instance, to sustain that burden. It is the judicial system which is responsible for the *public* disclosure of the transcript for once it became a part of the public file, it became accessible to the public, including the press. To place the onus on the newspaper to keep secret that which is public knowledge seriously conflicts with the First Amendment rights guaranteed by the United States Constitution. *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978). Although the majority attempts to distinguish *Landmark, supra*, from the case at bar, its distinction remains unconvincing. In *Landmark*, the United States Supreme Court held that the First Amendment does not permit criminal prosecution of a newspaper for publishing truthful information regarding confidential judicial proceedings. Here the newspaper published information from a public file which it could properly have presumed to be public knowledge. Clearly the right involved here "lies near[er] the core of the First Amendment" protection. *Id.* at 839.

For all of the foregoing reasons, I dissent.

APPENDIX C

ALFRED R. BOETTGER v. THOM LOVERRO AND EASTON PUBLISHING COMPANY APPEAL OF EASTON PUBLISHING COMPANY	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 00984-PHILA. 1984
ALFRED R. BOETTGER *Appellant* v. THOM LEVERRO AND EASTON PUBLISHING COMPANY	No. 1035 PHILA. 1984

Appeal from the Judgment in the
Court of Common Pleas of Northampton County,
Civil No. 1982-C-2846

PANEL CASE FILED JANUARY 3, 1986

BEFORE: SPAETH, P.J., JOHNSON AND SHOYER*, J.J.

OPINION BY SPAETH, P.J.:

This appeal is from a judgment awarding damages to appellee under Section 5725 of the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. §§5701 *et seq.*[1] Appellant, a newspaper, published an article containing quotations from the transcript of appellee's wiretapped conversations. The transcript was attached to the Commonwealth's answer to a motion for discovery, filed inci-

*The Honorable Kendall H. SHOYER, Senior Judge of the Court of Common Pleas of Philadelphia County, is sitting by designation.

[1]Section 5725 of the Act provides:

§5725. Civil action for unlawful interception, disclosure or use of wire or oral communication

(footnote continues)

dent to the prosecution of appellee, and was given to one of appellant's reporters by the clerk of the court. In addition to statutory and constitutional arguments, appellant argues that it is exempt from liability for publishing information of legitimate public concern obtained from court records accessible to the public. We agree that when enacting section 5725, the General Assembly intended such an exemption. We therefore reverse and enter judgment for appellant.

I

The trial court has summarized the facts, which it noted were largely undisputed, as follows:

> On November 17, 1981, the state police secured a wiretap permit from the Attorney General. Under the permit, a private citizen named Wayne Dickinson consented to a phone tap. On November 19,

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(footnote continued)

(a) Cause of action.—Any person whose wire or oral communications is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication; and shall be entitled to recover from any such person:

(1) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation, or $1,000, whichever is higher.

(2) Punitive damages.

(3) A reasonable attorneys' fee and other litigation costs reasonably incurred.

(b) Waiver of sovereign immunity.—To the extent that the Commonwealth and any of its officers, officials or employees would be shielded from liability under this section by the doctrine of sovereign immunity, such immunity is hereby waived for the purposes of this section.

(c) Defense.—It is a defense to an action brought pursuant to subsection (a) that the actor acted in good faith reliance on a court order or the provisions of this chapter.

1981, the state police intercepted a telephone conversation between the plaintiff [appellee] and Dickinson. During the conversation, plaintiff revealed his involvement in the acceptance of illegal bets on college football games. On December 12, 1981, the state police raided plaintiff's home. After the search, he was arrested on charges of bookmaking, pool selling and conspiracy. A preliminary hearing resulted in the charges being bound over for criminal court. On February 9, 1982, a motion for discovery was filed in the criminal case. The motion included a request for production of a transcript of the wiretap. Inadvertently,[1] the district attorney attached a copy of the transcript to his answer and filed it with the clerk of court. To make matters even worse, the district attorney did not direct the clerk to impound the file.

With these highly sensitve records lying outside the court's direct supervision, the stage was set for the unusual happenings which subsequently took place. On March 31, 1982, a suppression hearing was held in the criminal case. The hearing was open to the public. Among the observers was Thom Loverro, a reporter for the Easton Express.[3] He covered the hearing because he expected that the evidence would disclose the contents of the wiretaps. But, he did not get his story in the courtroom. As he sat there, the hearing judge disposed of the motion to suppress without ever getting into the contents of the tapes. When the hearing ended, Loverro went to the office of the clerk of court; and, he asked to see the case file.[4] Not being subject to impoundment, it was made available to him. In the file, Loverro discovered a transcript of the wiretaps. He made extensive notes of its content. Later that same day, he returned to his office and began writing a story based

upon the excerpts taken from the transcript of the wiretaps. However, the story was withheld for approximately seven days. In the meantime, Loverro discussed the running of the story with his superiors. On April 7, 1982, the managing editor approved publication. The newspaper article contained quotations from the transcript of the wiretaps.

3. A newspaper of daily circulation published by the defendant [appellant].

4. The evidence does not establish whether or not Loverro knew that the transcript could be found there.

Slip op. of tr. ct. at 2-3.

Appellee's complaint, which was filed on April 13, 1982, named as defendants both appellant, as the publisher of the Easton Express, and its reporter, Loverro. Appellee sought to recover on two grounds: the common law tort of invasion of privacy, and the cause of action for unlawful disclosure or use created by section 5725. During the trial, in September 1983, Loverro was dropped as a defendant, N.T. 130-31, and the action for invasion of privacy was withdrawn, *id.*, 91. The trial court denied appellant's requested points for charge and directed a verdict in favor of appellee on the issue of liability for unlawful disclosure or use, appellant excepting to the direction. The jury then returned a verdict of $1,000 actual damages (the statutory minimum), no punitive damages, and $17,409.43 for attorney's fees. Appellant filed a timely motion for judgment n.o.v. or new trial. On March 6, 1984, the court en banc, composed of the trial judge alone, denied the motion. Judgment was entered and this appeal followed.

II

We may first consider appellant's argument that when read literally, section 5725 does not make unlawful appellant's publication of a newspaper article containing quotations from the transcript of appellee's wiretapped conversations. The argument may be disposed of summarily.

Section 5725 creates a cause of action against "any person who intercepts, discloses or uses" the communication of another person when that communication has been "disclosed . . . in violation of this chapter." 18 Pa.C.S. §5725(a). The disclosure by the clerk of court of the transcript of appellee's wiretapped conversations was in violation of the Act, for the transcript was required by the Act to be sealed, 18 Pa.C.S. §5715, and had it been sealed, appellant would have had no right to see it, *Commonwealth* v. *Frattarola,* 336 Pa.Super. 411, 485 A.2d 1147 (1984). In publishing the newspaper article containing quotations from the transcript, appellant both "disclose[d]" and "use[d]" appellee's intercepted communication.

Appellant argues that it acted "with a subjective good faith belief that they [appellant and its reporter] acted legally pursuant to a court order and that the belief was reasonable." Brief for Appellant at 24. Subsection (c) of section 5725 does provide that "good faith reliance on a court order" is a defense to an action for unlawful disclosure or use. Had there been a court order directing the clerk to unseal the transcript of appellee's wiretapped conversations, this defense might have been available to appellant, but there was no such order.

III

We may consider appellant's remaining two arguments together. These arguments are: that appellant is exempt from liability under section 5725 because the information it published was of legitimate public concern and was obtained from court records accessible to the public; and that if sec-

tion 5725 does seek to impose liability on appellant, it is unconstitutional as a violation of the freedom of the press protected by the First and Fourteenth Amendments of the United States Constitution.

Appellant has from the outset, in its answer, and throughout, in its motion for summary judgment, requested points for charge, and motion for judgment n.o.v., argued that it is exempt from liability under section 5725. In making this argument, appellant has cited the Fair Report Privilege recognized in the Restatement (Second) of Torts §611 (1976).[2] Appellant has not, however, presented its constitutional argument with equal consistency; although making the argument in its motion for judgment n.o.v., appellant did not make it in either its pleadings or its requested points for charge. Accordingly, as such, the constitutional argument has not been preserved. The argument is nevertheless before us indirectly, or, so to speak, by the back door.

As we have just discussed, literally read, section 5725 proscribes appellant's conduct. The question therefore arises whether the section *should* be literally read, or whether appellant is correct that we should read into the section an exemption recognizing a privilege to publish information that is of legitimate public concern and that was obtained from court records accessible to the public. In considering whether to find such an exemption implied in section 5725, we must ask whether the failure to find the exemption implied might

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[2]The Fair Report Privilege applies to defamatory matter:

> Report of Official Proceeding or Public Meeting
>
> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.
>
> Restatement (Second) of Torts §611 (1976).

See Curran v. Philadelphia Newspapers, Inc., 497 Pa. 163, 439 A.2d 652 (1981) (adopting section 611).

render the section unconstitutional. For it is a settled principle of statutory construction that the legislature does not intend to violate the Constitution, and if as applied to appellant, section 5725 when literally read would violate the Constitution, we must consider whether an alternative construction, such as finding an implied exemption, will save the section. *Triumph Hosiery Mills, Inc.* v. *Commonwealth*, 469 Pa. 92, 96, 364 A.2d 919, 921 (1976) ("[O]ur duty [is] 'to declare a statute constitutional if this can reasonably be done,'" *citing Commonwealth* v. *Girard Life Insurance Co.*, 305 Pa. 558, 566, 158 A. 262, 264 (1932)), *appeal dismissed*, 429 U.S. 1083 (1977); *Commonwealth* v. *Rumsey*, 309 Pa.Super. 137, 139, 454 A.2d 1121, 1122 (1983) ("Legislative enactments are presumed valid, and will be stricken only if incapable of constitutional construction."); *Commonwealth* v. *Morgan*, 265 Pa.Super. 225, 248, 401 A.2d 1182, 1193 (1979) ("[W]here alternative constructions of a statute are possible, we must avoid a construction that would result in a statute's being struck down unnecessarily.").

-A-

In considering whether if literally read, section 5725 would violate the Constitution, we may start by recognizing that "[the United States Supreme Court's] recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979). Of these recent decisions, *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), is particularly in point.

In *Cox* the issue was "whether, consistently with the First and Fourteenth Amendments, a State may extend a cause of action for damages for invasion of privacy caused by the publication of the name of a deceased rape victim which was publicly revealed in connection with the prosecution of the crime." *Id.* at 471. A Georgia statute made it a misdemeanor for the news media to publish or broadcast the name

or identity of a rape victim.[3] *Id.* at 471-72. In the course of criminal proceedings related to the rape, a reporter for Cox Broadcasting "approached the clerk of the court . . . and requested to see a copy of the indictments. In open court, [the reporter] was handed . . . both the murder and the rape indictments, and was allowed to examine fully [those] document[s]." *Id.* at 472, n. 3. By examining the indictments the reporter learned the name of the rape victim, and he revealed the name in a news report concerning the criminal proceedings, broadcast later the same day and again the next day on a television station owned by Cox Broadcasting. *Id.* at 472-74. The father of the rape victim brought an action for money damages alleging that his right to privacy had been invaded by the broadcast of his deceased daughter's name.

The trial court rejected Cox Broadcasting's claim under the First and Fourteenth Amendments, and, holding that the Georgia statute granted the father a civil remedy, granted summary judgment as to liability. *Id.* at 474. On appeal the Georgia Supreme Court found that the trial court erred in finding that the Georgia statute granted the father a civil remedy but nevertheless found that the father had adequately stated a cause of action for invasion of his right of privacy, and for a common law tort of public disclosure. *Id.* Noting that questions of fact remained to be determined, the Georgia

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[3] The Georgia statute provided:

> It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor.

Ga. Code Ann. §26-9901 (1972).

Supreme Court reversed the order entering summary judgment and remanded for trial. *Id.* at 475. The Georgia Supreme Court agreed with the trial court's holding that the First and Fourteenth Amendments did not require judgment for Cox Broadcasting as a matter of law, *id.*, but later, in response to a motion for rehearing, held that the Georgia statute was a "legitimate limitation on the right of freedom of expression contained in the First Amendment," and that there was "no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection." *Id.*

On Cox Broadcasting's further appeal, the United States Supreme Court opened its discussion by acknowledging that "there *is* a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity." *Id.* at 487 (Court's emphasis; footnote omitted). The Court noted, however, that the issue before it was not the broad issue of the extent to which a State may "protect an area of privacy free from unwanted publicity in the press," *id.* at 491, but the much narrower issue of "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records — more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection," *id.* "We are convinced," the Court concluded, "that the State may not do so." *Id.* The Court explained:

> Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of

> public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in offical court records open to public inspection.
>
> *Id.* at 495.

See also Smith v. *Daily Mail Publishing Co., supra* (State may not punish truthful publication of alleged juvenile delinquent's name where the information was lawfully obtained); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978) (reaffirming *Cox* and holding that State may not impose criminal sanctions on press for publishing, in violation of State Constitution and statutes, information relating to judicial disciplinary proceedings); *Oklahoma Publishing Co.* v. *District Court of Oklahoma*, 430 U.S. 308 (1977) (where reporters acquired information by being present at court proceedings, the name and picture of juvenile were "publicly revealed" and in the "public domain" as much as the name of the rape victim in *Cox*, and therefore injunction prohibiting publication of the information violated the First and Fourteenth Amendments).

In the present case, the information published by appellant was part of court records accessible to the public, as was true in *Cox*. In addition, the information was required to be sealed or otherwise treated as confidential, as was true in *Landmark Communications*. In *Cox*, *Landmark Communications*, and *Smith*, the defendant newspaper obtained the information in question in a lawful manner and reported it accurately. Appellant likewise obtained the information lawfully and reported it accurately. So far, therefore, the present case appears indistinguishable from *Cox*, *Landmark Communications*, and *Smith*.

The question remains whether the cases are distinguishable on the basis of the type of information involved — the

name of the deceased rape victim in *Cox*, the name of the judge being investigated in *Landmark Communications*, the name of the juvenile offender in *Smith*, and the transcripts of appellee's conversations here. We conclude that this is not a basis of distinction. The information here, like the information in *Smith*, was "about a matter of public significance," *Smith*, 443 U.S. at 103; and like the information in *Cox*, it involved "commission of crime, prosecution[] resulting from it, and judicial proceedings arising from the prosecution[], . . . without question events of legitimate concern to the public," *Cox*, 420 U.S. at 492. *Cf. Baker* v. *Burlington Northern, Inc.*, 99 Idaho 688, 587 P.2d 829 (1978) (disclosure of public facts, plaintiff's prior criminal record, not actionable as invasion of privacy); *State* v. *Stauffer Communications, Inc.*, 225 Kan. 540, 592 P.2d 891 (1979) (state cannot impose sanctions on news media for publishing information concerning unexecuted arrest warrant where such information taken from public records); *Rawlins* v. *Hutchinson Publishing Co.*, 218 Kan. 295, 543 P.2d 988 (1975) (*Cox* applied to record ten years old); *Montesano* v. *Donrey Media Group*, 99 Nev. 644, 668 P.2d 1081 (1983) (where information of juvenile offense obtained from public records, the probation and parole report prepared for sentencing for subsequent crime, media not liable for invasion of privacy), *cert. denied*, ____U.S.____, 104 S.Ct. 2172 (1984); *Shifflet* v. *Thomson Newspapers (Ohio), Inc.*, 69 Ohio St.2d 179, 431 N.E.2d 1014 (1982) (per curiam) (where reporter at expungement hearing and information reported truthfully, First and Fourteenth Amendments do not permit exposing press to liability; citing *Landmark Communications, Oklahoma Publishing*, and *Cox*); *Ayers* v. *Lee Enterprises, Inc.*, 277 Or. 527, 561 P.2d 998 (1977) (police report was public record and, following *Cox*, no liability for publishing name and address of rape victim); *Philadelphia Newspapers, Inc.* v. *Jerome*, 478 Pa. 484, 387 A.2d 425 (1978) (in upholding trial court's order limiting public access to suppression hearing, appellate court, citing *Oklahoma Publishing*, notes that trial court had no

authority to "gag" the press"), *appeal dismissed,* 443 U.S. 913 (1979); *Mark* v. *Seattle Times,* 96 Wash.2d 473, 635 P.2d 1081 (1981) (en banc) (information from affidavit of probable cause included in record privileged under *Cox*), *cert. denied,* 457 U.S. 1124 (1982).

-B-

Given *Cox, Landmark Communications,* and *Smith,* we are constrained to conclude that the legislature did not intend that section 5725 should be construed to impose liability on appellant for its publication of information of legitimate public concern lawfully obtained from court records accessible to the public. For if we were to give the section such a construction, its application to appellant would violate the First and Fourteenth Amendments. We therefore hold that included in the section is an implied exemption for the publication of lawfully obtained information of legitimate public concern. So construed, application of the section to appellant presents no constitutional issue. *Cf. Commonwealth* v. *Morgan, supra* (to preserve constitutionality of statute, phrase, "not manifestly appropriate to lawful uses it [instrument of crime] may have," construed to mean "manifestly inappropriate to lawful uses it may have").

We are confirmed in this conclusion by the application of one further principle of statutory construction. When the legislature enacts a statute after an interpretation of the law by a court of last resort, it will be assumed that the legislature intended the statute to incorporate that interpretation. 1 Pa.C.S. §1922(3). Here, the General Assembly enacted section 5725 as part of the Act of October 4, 1978, P.L. 331, No. 164, §2, after the United States Supreme Court's decisions in

Cox, Landmark Communications, and *Oklahoma Publishing.*[4] We may assume, therefore, that in enacting section 5725, the General Assembly did not intend to deprive appellant of the constitutional right of publication upheld in those decisions. Since the General Assembly did not specifically exempt such publication, it is reasonable to imply an exemption.[5]

Judgment reversed and judgment entered for appellant.

JOHNSON, J. files a Concurring Opinion.

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[4]Compare prior provisions: Act of July 16, 1957, P.L. 956, No. 411, §1, 15 P.S. §2443 [renumbered 18 P.S. §3742], repealed Act of Dec. 6, 1972, P.L. 1482, No. 334, §5; Act of Dec. 6, 1972, P.L. 1482, No. 334, §1, 18 Pa.C.S. §5704.

[5]Given this disposition, we do not address appellee's argument that he is intitled to punitive damages.

ALFRED R. BOETTGER v. THOM LOVERRO AND EASTON PUBLISHING COMPANY APPEAL OF EASTON PUBLISHING COMPANY	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 00984-PHILA. 1984
ALFRED R. BOETTGER *Appellant* v. THOM LEVERRO AND EASTON PUBLISHING COMPANY	No. 1035 PHILA. 1984

Appeal from the Judgment entered April 5, 1984,
Court of Common Pleas, Northampton County,
Civil Division at No. 1982-C-2846

FILED January 3, 1986

BEFORE: SPAETH, P.J., JOHNSON AND SHOYER,* JJ.

CONCURRING OPINION BY JOHNSON, J.:

I write separately because I do not believe that the manner in which the information was obtained from the clerk of court's office was within the legislature's contemplation when promulgating the Act. Once the transcripts were made a part of the unsealed case file, they became, for all intents and purposes, matters of public record. Appellant could not then willfully disclose or use the information in a manner which violated the law because, in my view, that information was no longer shrouded in the secrecy provided by the Wiretap Act. Any private citizen could have viewed the wiretap transcripts

*Judge SHOYER, Senior Judge of the Court of Common Pleas of Philadelphia County, Pennsylvania, is sitting by designation.

in the clerk of court's office and would be no more or less subject to criminal or civil liability than appellant herein.

The principles of statutory construction analyzed by my esteemed brother are unquestionably valid, but I see no need to evaluate a possible constitutional conflict in this case to determine the intent of legislature. Moreover, I do not believe that a constitutional question is before us, indirectly or otherwise, because, as stated by the majority, it was not properly preserved. The majority's erudite discussion in Part III-A is, therefore, unnecessary to our disposition of this case.

I concur in the result reached by the majority in Part III-B that an implied exemption for the publication of lawfully obtained information of legitimate public concern is included in section 5725. In my mind, the discussion begins and ends here. I would, therefore, reverse the judgment simply on the basis that the trial court, as a matter of law, should not have found a statutory violation where none had occurred.

APPENDIX D

IN THE

Court of Common Pleas of

NORTHAMPTON COUNTY, PENNSYLVANIA
CIVIL ACTION — LAW

ALFRED R. BOETTGER, *Plaintiff*	
vs.	No. 1982-C-2846
THOM LOVERRO and EASTON PUBLISHING COMPANY, *Defendants*	In Trespass

OPINION OF THE COURT EN BANC

This is an action to recover damages for breach of privacy arising from the divulgence of the contents of an intercepted telephone conversation. The jury returned a verdict for the plaintiff in the amount of $18,409.43. Presently before us for disposition are defendant's motion for a judgment n.o.v. or, in the alternative, a new trial, and plaintiff's motion for a new trial limited to damages.[1]

The facts are largely undisputed and may be summarized as follows: On November 17, 1981, the state police secured a wiretap permit from the Attorney General. Under the permit, a private citizen named Wayne Dickinson consented to a phone tap. On November 19, 1981, the state police intercepted a telephone conversation between the plaintiff and Dickinson. During the conversation, plaintiff revealed his involvement in the acceptance of illegal bets on college football games. On December 12, 1981, the state police raided plaintiff's home. After the search, he was

[1]The Court en Banc was composed of the trial judge alone pursuant to Pa. R.C.P. 227.2.

arrested on charges of bookmaking, pool selling and conspiracy. A preliminary hearing resulted in the charges being bound over for criminal court. On February 9, 1982, a motion for discovery was filed in the criminal case. The motion included a request for production of a transcript of the wiretap. Inadvertently,[2] the district attorney attached a copy of the transcript to his answer and filed it with the clerk of court. To make matters even worse, the district attorney did not direct the clerk to impound the file.

With these highly sensitive records lying outside the court's direct supervision, the stage was set for the unusual happenings which subsequently took place. On March 31, 1982, a suppression hearing was held in the criminal case. The hearing was open to the public. Among the observers was Thom Loverro, a reporter for the Easton Express.[3] He covered the hearing because he expected that the evidence would disclose the contents of the wiretaps. But, he did not get his story in the courtroom. As he sat there, the hearing judge disposed of the motion to suppress without ever getting into the contents of the tapes. When the hearing ended, Loverro went to the office of the clerk of court; and, he asked to see the case file.[4] Not being subject to impoundment, it was made available to him. In the file, Loverro discovered a transcript of the wiretaps. He made extensive notes of its content. Later that same day, he returned to his office and began writing a story based upon the excerpts taken from the transcript of the

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[2]We say inadvertently because there is no evidence that the district attorney knew his actions were in violation of the law. Unfortunately, the district attorney's safekeeping of the recordings was in total noncompliance with the governing statute. No application was ever made for their sealing under the direction of the court. Moreover, no attempt was made to place the records in the custody of court; nor, was the court given the opportunity to monitor disclosure. See *Wiretapping and Electronic Surveillance Control Act*, 18 Pa. C.S.A. § 5714(b) and § 5715.

[3]A newspaper of daily circulation published by the defendant.

[4]The evidence does not establish whether or not Loverro knew that the transcript could be found there.

wiretaps. However, the story was withheld for approximately seven days. In the meantime, Loverro discussed the running of the story with his superiors. On April 7, 1982, the managing editor approved publication. The newspaper article contained quotations from the transcript of the wiretaps.

I. DEFENDANT'S MOTION FOR JUDGMENT N.O.V.

Section 5703 of the Wiretapping and Electronic Surveillance Act[5] provides:

> "A person is guilty of a felony of the third degree if he:
>
> (omitting subparagraphs (1) and (2)) . . .
>
> (3) willfully uses or endeavors to use the contents of any wire or oral communications, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire or oral communication."

Although the defendant was never charged with the above criminal offense, it was sued under Section 5725 of Act, which reads:

> "(a) Cause of action. — Any person whose wire or oral communications is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communications;

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[5]Act of October 4, 1978, P.L. 831, 18 Pa. C.S.A. § 5701 et seq., effective December 1978. This Act repealed the Invasion of Privacy Act previously enacted on December 6, 1972.

and shall be entitled to recover from any such person:

(1) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation, or $1,000,000, whichever is higher.

(2) Punitive damages.

(3) A reasonable attorneys' fee and other litigation costs reasonably incurred."

The trial judge gave binding instructions under which the jury was told to find the defendant liable. In accordance with those instructions, the jury found no actual damages; they assessed liquidated damages for the one day of violation at the higher rate of $1,000,000. No award was made for punitive damages; however, attorneys' fee and other litigation costs were awarded in the amount of $17,409.43.

Defendant argues that the trial court erred in granting binding instructions in favor of the plaintiff. Furthermore, defendant contends that it is not liable under Section 5725 of the Wiretapping and Electronic Surveillance Act and, therefore, requests the entry of a judgment n.o.v. In asserting its non-liability as a matter of law, defendant raises three grounds: (1) the consent exception contained in the statute; (2) that the disclosure was not willful; and, (3) that it acted in good faith.

So far as point one is concerned, the contention lacks merit. Defendant relies on *Smith* v. *Cincinnati Post & Times*, 475 F.2d 740 (6th Cir. 1973). The case is factually distinguishable. In *Smith*, one of the parties to the conversation divulged its conents to the newspaper. Here, neither party consented to defendant's use of the intercepted message. Moreover, Section 5704 of our statute lists the permissible exceptions. Of the seven situations described, none fits the circumstances of this case. The fourth exception comes the closest. However, it applies to interception rather than disclo-

sure; and, even the fourth exception requires the consents of *all* parties to the communication. (Emphasis supplied.)

The second point is the heart of this case. It is uncontested that the defendant lawfully obtained the wiretap information from records open to public inspection. Defendant argues that once the information was lodged with the clerk of court through the district attorney's violation of the statute, the press was free to publish it. In other words, the press had the right to exploit the district attorney's faulty performance of his safekeeping responsibilities. We disagree. Granting that the defendant's access to the wiretap information did not result from its own unlawful conduct, the statute did not cease to operate. It is important to note that the statute is divisible. As such, it regulates not only the interception step but the disclosure and use, as well. When the statute deals with use, it becomes most restrictive in nature. In fact, the statute contemplates solely two uses for the contents of intercepted telephone conversations. One use is for investigative activities among law enforcement officers. See § 5717(a) of the Act, supra. The other use is as evidence in criminal proceedings. See § 5717(b) of the Act, supra. Even the most cursory reading of the use provisions establishes that the public, including the press, was not intended to know about the contents of wiretaps until an investigative or law enforcement officer was "giving testimony under oath or affirmation" in a "criminal proceeding in any court of this Commonwealth or of another state or of the United States."

On the surface, holding a newspaper liable for the use of wiretap information which literally "fell into its lap", may appear to create a dangerous precedent with respect to freedom of the press. This is not so when one digs a little deeper into the situation and considers the kind of invasion of privacy sanctioned by the statute.

Before the enactment of the Wiretapping and Surveillance Act of 1978, this case could not have arisen because not even the government was allowed to intercept telephone con-

versations. In arming law enforcement with this new investigative power, the legislature was so apprehensive about its misuse that an expiration date of five years was set, unless the Act was extended.[6] See § 3 of Act 1978, Oct. 4, P.L. 831, No. 164. This evidences an overriding legislative concern for the protection of privacy. Thus, we believe that all disclosures and uses of wiretap information must be in strict compliance with the Act.

In the case at bar, the defendant knew the information was produced by the state police via a wiretap. See Exhibits, story of April 7, 1982. Yet, defendant published the story without seeking a legal opinion from its lawyer. (Deposition of Loverro at pages 49-50; introduced at trial by video tape.) Under such circumstances, defendant's ignorance of the law was self-imposed. In addition, Loverro testified that knowledge of the statute would not have deterred him from using the intercepted private telephone conversations. (Deposition, p. 60; also introduced into evidence by video tape.) The imposition of liability is the only way to prevent a newspaper from so capitalizing on a breakdown in the statute. Private damage suits will give a large measure of incentive for compliance with the standards for proper use of information gained by wiretaps. See *Wrongful Interception — Civil Action*, 25 ALR Fed 759. After all, the information would not exist but for "legislative authorization". Accordingly, we cannot find any jurisdiction for permitting a newspaper to rely on the statute to gain the information, but to disavow its standards with regard to the place and time for use.

Defendant suggests that our interpretation of the statute amounts to a prior restraint. Once again, we disagree and reject defendant's challenge to the statute's constitutionality. In prior restraint cases, there is a presumption that the information may be published. And, that presumption cannot be removed until a hearing establishes reasons to restrict use of

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[6]Recently, the Act was extended by the legislature.

the information. The exact opposite presumption is applicable to information gained through a wiretap. Such information is illegal per se. Only the statute creates an exception to this general rule. However, the statute imposes its own set of restrictions. One of those restrictions provides that the sole public use which can be made of intercepted communications is as evidence in a criminal proceeding. § 5717(b), supra. Since the right to intercept private telephone conversations is a creature of the legislature, we believe that body has the power to prohibit dissemination of the contents until after the information becomes evidence in a judicial proceeding. Thus, the statute fixes when and where the individual loses the privacy of his telephone conversations. Here, the defendant violated the plaintiff's right to privacy by making premature use of the information before it became evidence.

Next defendant contends that the disclosure was not willful. An acceptable definition from Webster's Third New International Dictionary states that willful denotes an act done deliberately, or one which is self-determined, as distinguished from accidental. Defendant cites the following language from *United States* v. *Murdock*, 290 U.S. 389, 394-395, 54 S. Ct. 223, 78 L.Ed. 381 (1933), as an appropriate definition of willfulness:

> "The word (willful) often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act."

We are not certain that the criminal standard applies to this civil action. But, even assuming it does, such willful conduct is present here. After gaining access to the information, defendant waited approximately seven days to publish

it. Obviously, this delay reflects defendant's knowledge that highly sensitive information had fallen into its hands. Nevertheless, a determination was made to run the story without specific grounds for believing it was lawful. Relying solely on a general concept of "freedom of the press", defendant went ahead without seeking legal advice. We are satisfied that its conduct was marked by a careless disregard as to whether or not it had a right to publish the contents of private telephone conversations.

Defendant also argues that it acted in good faith reliance upon the court's suppression ruling. We need not give much consideration to this argument. Defendant knew that the contents of the intercepted telephone conversations had not been divulged in the suppression hearing. That is the very circumstance which sent its reporter, Loverro, scurrying to the clerk's office. What was published thereafter was gained outside the courtroom and not in it. In addition, the defendant cannot claim reliance upon the suppression ruling itself. It reads as follows:

> "AND NOW, this 31st day of March, 1982, the Court enters the following order: The motion for suppression of each defendant are hereby denied and dismissed." See Transcript of Continued Hearing, etc., March 31, 1982, at page 3.

The fact that defendant waited until the entry of the above order is of no significance. Nothing was divulged in the ruling. Hence, the first public disclosure is still traceable to acts done by the defendant rather than by the court. Moreover, we adopt the holding of *Citron* v. *Citron*, 539 F. Supp. 621 (S.D.N.Y. 1982). There, good faith was rejected as a defense under an almost indentical federal statute in these words:

> " . . . the good faith defense simply does not apply to actions (civil or criminal) against persons not engaged in law enforcement. There exists no statutory procedure whereby such persons can

secure official authorization of interceptions they wish to make; thus, they will never be in a position to invoke the defense . . . " at p. 626.

II. DEFENDANT'S ALTERNATE MOTION FOR A NEW TRIAL

Once the trial court concluded that the statute prohibits the public use of "wiretapped" information other than as evidence in a criminal proceeding, there was no issue of fact for the jury concerning liability. This is so because it is undisputed that the defendant knew it was using the intercepted conversations in their "raw" state, and before the information had been introduced as evidence in a judicial proceeding. After a careful review of the statute, we remain convinced that this strict construction is necessary. Only in this way, can a proper balance be struck between the interest for effective law enforcement and the need to protect the individual right of privacy. As previously mentioned, the legislature's purpose in granting authorization for wiretapping was to assist law enforcement and not to create news. When that statutory purpose is kept in mind, there is no "chilling" effect on freedom of the press by requiring the media to wait until the information is used in court. If a newspaper voluntarily decides to violate the statutory format, then it should be held liable as a matter of law. Therefore, we affirm the trial court's binding instructions in favor of the plaintiff; and, defendant's motion for a new trial on the liability issue is denied.

III. PLAINTIFF'S MOTION FOR A NEW TRIAL LIMITED TO DAMAGES

Plaintiff argues that punitive damages are mandatory under § 5725 of the Act. We do not think so. Exemplary damages are allowed only when the act which creates actual damage also imports insult or outrage, and is committed with a view to oppress, or appears to have been committed in contempt of a plaintiff's rights. Although they have been allowed in certain cases, there must be present malice or

wanton conduct to justify the allowance. *Golomb* v. *Korus*, Pa. Super., 396 A.2d 430 (1978). We have no quarrel with plaintiff's reference to the mandatory construction usually afforded to the word "shall". However, in § 5725, "shall" is used in connection with the word "entitled" which means — to give a right to. Thus, § 5725 provides that the jury shall have the right to award punitive damages. Nonetheless, in exercising that right, the jury is bound by the law of this Commonwealth. In this case, plaintiff's entitlement to punitive damages was submitted to the jury. The submission was accompanied with an accurate statement of the applicable law. So instructed, the jury resolved the issue of punitive damages against the plaintiff. We find no reason to disturb the jury's verdict.

WHEREFORE, we enter the following:

ORDER OF COURT EN BANC

AND NOW, this 6th day of March, 1984, in accordance with the foregoing Opinion, it is ORDERED, ADJUDGED and DECREED that:

1. Defendant's motion for a judgment n.o.v. is denied and dismissed.

2. Defendant's motion for a new trial, on both liability and damages, is denied and dismissed.

3. Plaintiff's motion for a new trial, limited only to damages, is denied and dismissed.

4. The prothonotary is directed to enter final judgment on the jury's verdict.

BY THE COURT,

/s/
MICHAEL V. FRANCIOSA,
Judge